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Supreme Court, U.S.
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No. 02-693

In the Supreme Court of the United States

JOHN M. LAMIE, PETITIONER

v.

UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Section 330(a)(1) of the Bankruptcy Code, 11 U.S.C. 330(a)(1), authorizes a court to use the funds of a bankruptcy estate to compensate an attorney of a chapter 7 debtor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 290 F.3d 739. The opinion of the district court (Pet. App. 15a-27a) is reported at 260 B.R. 273. The opinion of the bankruptcy court (Pet. App. 28a-44a) is reported at 253 B.R. 724.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2002. A petition for rehearing was denied on August 5, 2002 (Pet. App. 45a). The petition for a writ of certiorari was filed on November 4, 2002, a Monday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 24, 1998, Equipment Services, Inc., filed a voluntary petition for relief under the debt reorganization provisions of chapter 11 of the Bankruptcy Code. At the time of the filing and subject to court approval under 11 U.S.C. 327(a), the company had retained petitioner, an attorney, to represent it in the bankruptcy proceedings and had given petitioner a $6000 retainer, of which $1000 was used to pay the fees and costs of filing the petition. Petitioner deposited the remaining $5000 in an escrow account, to be drawn upon as petitioner earned fees. On January 26, 1999, the bankruptcy court approved petitioner's continued employment as the attorney for the debtor-in-possession in the chapter 11 proceeding. Pet. App. 2a, 28a.

In March 1999, on the motion of the United States Trustee, the proceeding was converted into a case under chapter 7 of the Code. Petitioner filed an application with the bankruptcy court seeking $2325 in attorneys fees, $1325 of which was earned during the chapter 11 proceeding and $1000 of which was earned during the chapter 7 proceeding. The United States Trustee objected to the application to the extent that it requested $1000 compensation for services rendered after the case was converted to a chapter 7 proceeding. Pet. App. 4a, 15a-17a, 29a.[1]

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[1] The United States Trustee is charged with the responsibility to "supervise the administration of cases under * * * chapter 7, 11, 12, or 13 of title 11 by * * * reviewing * * * applications filed for compensation and reimbursement under section 330 of title 11[] and filing with the court" any "objections to such application." 28 U.S.C. 586(a)(3)(A)(i) and (ii). See also 11 U.S.C. 307 ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title.")

The bankruptcy court held that the Code did not authorize a chapter 7 debtor's attorney to be paid funds from the bankruptcy estate. Pet. App. 30a-38a. The court explained that, before the Code was amended in 1994, 11 U.S.C. 330 (Supp. IV 1986) had authorized an award to any debtor's attorney, but Congress in a 1994 amendment to Section 330 deleted the statutory language authorizing such an award. The court thus observed (Pet. App. 34a) that, as originally adopted, Section 330(a) provided that:

> After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services, other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 330, 92 Stat. 2564 (codified at 11 U.S.C. 330(a) (1994) (emphasis added)). The court also observed (Pet. App.

34a) that, in 1994 Congress amended Section 330 to provide in relevant part:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
> >
> > (B) reimbursement for actual, necessary expenses.

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224(b), 108 Stat. 4130 (codified at 11 U.S.C. 330(a)(1)). The court further observed that Congress in 1994 added a separate provision to Section 330 that "provide[s] express authority for payment of counsel to a Chapter 12 or 13 debtor from the estate." Pet. App. 33a (citing 11 U.S.C. 330(a)(4)(B)). The court accordingly concluded that there was no authority to award fees to a chapter 7 debtor's attorney. The bankruptcy court nonetheless awarded petitioner fees for services rendered while the case proceeded under chapter 7 because the court concluded that the pre-petition retainer was not, under state law, property of the bankruptcy estate. *Id.* at 38a-43a.[2]

[2] On July 10, 2000, the bankruptcy court also approved petitioner's application for $1325 in fees earned for services rendered while the case was proceeding under chapter 11. Pet. App. 29a n.18. During that period, the debtor-company had received court approval to retain petitioner while it was a debtor-in-possession under chapter 11. As such, the Code granted the debtor-in-possession many of the statutory powers accorded to a trustee, 11 U.S.C. 1107(a), including authority to retain a professional person such as an attorney to represent the debtor in carrying out its duties as a trustee, 11 U.S.C. 327(a). See 11 U.S.C. 330(a)(1) ("the court may award [compensation] to * * * a professional person employed under section 327").

2. The district court affirmed. Pet. App. 15a. The court concluded that Section 330(a)(1) was "plain" in not authorizing fees to a chapter 7 debtor's attorney. *Id.* at 22a, 24a. The district court nonetheless agreed with the bankruptcy court's conclusion that, under state law, the retainer was not property of the estate and accordingly that petitioner was entitled to draw from the retainer fees earned during the chapter 7 proceeding. *Id.* at 25a-26a.

3. A divided panel of the court of appeals affirmed the district court's construction of Section 330, but the panel unanimously reversed the district court's conclusion that the retainer was not property of the bankruptcy estate. Pet. App. 1a-14a.[3] The court held that Section 330(a) does not authorize a chapter 7 debtor's attorney to be compensated from the estate. *Id.* at 5a-9a. The court explained that the Fifth and the Eleventh Circuits had reached similar holdings. *Id.* at 8a-9a (citing *In re American Steel Prod., Inc.*, 197 F.3d 1354, 1356-1357 (11th Cir. 1999); *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414, 425 (5th Cir. 1998)). The court also observed that three circuits had reached contrary results. *Id.* at 6a-7a (citing *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130 (3d Cir. 2000); *In re Century Cleaning*

[3] Petitioner does not challenge the court of appeals' conclusion (Pet. App. 9a-12a) that the retainer was part of the bankruptcy estate. Pet. 8 n.2.

Servs., Inc., 195 F.3d 1053, 1056-1061 (9th Cir. 1999); *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 72 (2d Cir. 1996)).

In joining the Fifth and Eleventh Circuits, the court of appeals reasoned that "§ 330(a), as revised in 1994, omits the phrase 'or the debtor's attorney' from the list of persons to whom a court may award 'reasonable compensation' from the bankruptcy estate for services rendered in a Chapter 7 proceeding." Pet. App. 6a. The court concluded that, "[w]hile * * * the circuits are split and * * * arguments may reasonably be made that Congress made an inadvertent error in amending § 330(a)," the court "should follow the plain language of the 1994 version of § 330(a), particularly because application of that plain language supports a reasonable interpretation of the Bankruptcy Code." *Id.* at 8a. The court of appeals related (*id.* at 7a-8a) the United States Trustee's observations that legal services performed on behalf of a chapter 7 debtor do not enlarge the size of the estate and, in any event, a chapter 7 trustee may hire an attorney to perform any legal services necessary to liquidate the estate.

The court of appeals also observed that "[t]he current version of § 330(a) has been in force now for eight years and Congress has not elected to recognize that it made a scrivener's error when it amended the statute in 1994." Pet. App. 9a. Accordingly the court concluded that, "[b]ecause the plain language of § 330(a) as it is now written is unambiguous and is reasonable in application," the court was "constrained to enforce the language as written." *Ibid.*

Judge Michael dissented from the court's holding that Section 330 did not authorize the award of fees to a chapter 7 debtor. Pet. App. 13a-14a. In his view, "when Congress amended § 330(a) in 1994, it inadvertently deleted debtors' attorneys from the existing statutory list of those who could be paid from the bankruptcy estate for services rendered in bankruptcy proceedings." *Id.* at 13a. He accordingly believed that "[t]his drafting error should not prevent a Chapter 7 debtor's attorney from being paid with funds from the estate, just as he could before the error occurred." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that Section 330 does not authorize an award of attorney fees to a chapter 7 debtor from the funds of the bankruptcy estate. We nevertheless agree with petitioner that the Court should grant certiorari in this case. The courts of appeals are divided on the question whether courts should apply Section 330 as if it contained the phrase "or the debtor's attorney" that Congress deleted in the 1994 amendments to Section 330, and the question is of recurring significance to the administration of bankruptcy proceedings under chapter 7 and chapter 11. Although the amount at issue in this case, and in these cases generally, is quite small, the issue has divided the courts of appeals and will continue to divide the circuits unless this Court resolves the issue.

1. The court of appeals correctly held that Section 330 is plain in not authorizing a court to award fees to a chapter 7 debtor's attorney. By its plain and express terms, Section 330(a)(1) authorizes only three classes of individuals to seek reimbursement of fees from bankruptcy estates—trustees, examiners, or professional persons employed by a trustee under Section 327 or by a committee authorized under Section 1103. 11 U.S.C. 330(a)(1). Section 330(a)(4)(B) also expressly authorizes

fees to "the debtor's attorney" "[i]n a chapter 12 or 13 case." 11 U.S.C. 330(a)(4)(B).

Petitioner does not contend that he falls into any of the express categories covered by Section 330(a)(1), or that there is any other provision of the Code that authorizes a chapter 7 debtor's attorney to seek compensation from funds of the bankruptcy estate. Rather, petitioner argues (Pet. 11) that this Court should read Section 330(a)(1) to include the phrase "or the debtor's attorney" that was deleted by the 1994 amendments because the deletion "was an inadvertent scrivener's error." Petitioner raises various arguments (Pet. 11-17) that allegedly support a conclusion that the deletion was a drafting error by Congress.

Courts, however, do not have "*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). When "the statute's language is plain, 'the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). None of petitioner's contentions shows that Section 330(a)(1) as it is currently written produces an absurd result that would justify authorizing a chapter 7 debtor's attorney from seeking funds from the estate when that authority was deleted from the statute by Congress in 1994.

2. Although the court of appeals' decision is correct, we agree with petitioner that the Court should grant certiorari in this case. The courts of appeals are divided on the question whether Section 330 should be read to contain the phrase "or the debtor's attorney" that the Congress deleted in the 1994 amendments to Section

330(a)(1). That issue has implications for two categories of attorneys who, under the Section 330(a)(1) as it is currently written, are not authorized to seek compensation from bankruptcy estate funds: chapter 7 debtors' attorneys and chapter 11 debtor-out-of-possession attorneys.[4]

In addition to the Fourth Circuit in this case, the Eleventh Circuit in *In re American Steel Product, Inc.*, 197 F.3d 1354, 1356-1357 (1999), has held that Section 330 plainly does not authorize attorneys for debtors under chapter 7 to seek an award of fees. Similarly, the Fifth Circuit in *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414, 425 (1998), has held that Section 330 is plain in not authorizing attorneys for debtors-out-of-possession under chapter 11 to seek an award of fees. By contrast, the Ninth Circuit in *In re Century Cleaning Services, Inc.*, 195 F.3d 1053, 1060 (1999), has held that the court may award fees to a chapter 7 debtor's attorney, reasoning that deletion of the four words "or the debtor's attorney" in the 1994 amendments "resulted from an unintended slip of the pen and not from a deliberate change." The Third Circuit in *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 128 (2000), likewise has held that the Code permits an attorney for a chapter 11 debtor-out-of-possession to seek an award of fees, agreeing with the Ninth Circuit's conclusion that "courts should read 'debtor's attorney' back into the statute." The Second Circuit in *In re Ames Department Stores, Inc.*, 76 F.3d 66, 71-72 (1996) in dicta simi-

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[4] Section 330 authorizes a court to use bankruptcy estate funds to award fees to attorneys for chapter 12 and chapter 13 debtors. 11 U.S.C. 330(a)(4)(B). The Code also authorizes compensation to attorneys for chapter 11 debtors-in-possession. 11 U.S.C. 327, 330(a)(1), 1107(a) (see note 2, *supra*).

larly has indicated that it is "inclined to agree" that the omission of the phrase "the debtor's attorney" from the coverage of the amended Section 330 "was inadvertent." That conflict is mature, deep, and implicates a recurring issue that is important to the administration of bankruptcy proceedings and that should receive uniform treatment throughout the Nation. This Court's review is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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